

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 09-01**

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**MITSUMI O.S.K. LINES LTD.**

**COMPLAINANT**

**v.**

**GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS  
GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J.  
MISCHIANI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD  
ENTERPRISES, INC. AND CHAD J. ROSENBERG**

**RESPONDENTS**

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**REPLY OF OLYMPUS RESPONDENTS TO EXCEPTIONS  
FILED BY COMPLAINANT MITSUI O.S.K. LINES, LTD.**

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August 22, 2013

**REPLY OF OLYMPUS RESPONDENTS TO EXCEPTIONS  
FILED BY COMPLAINANT MITSUI O.S.K. LINES, LTD.**

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Pursuant to Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227, Respondents Olympus Growth Fund III, L.P. ("OGF"), Olympus Executive Fund, L.P. ("OEF"), Louis J. Mischianti ("Mischianti"), L. David Cardenas ("Cardenas") and Keith Heffernan ("Heffernan") (hereinafter collectively referred to as the "Olympus Respondents") respectfully submit their Reply to the exceptions ("MOL's Exceptions") to the Initial Decision of Administrative Law Judge Paul B. Lang (the "Presiding Judge") filed by Complainant Mitsui O.S.K. Lines, Ltd. ("MOL").

**I. Olympus Respondents' Position in This Proceeding**

The Olympus Respondents are not entities regulated by the Shipping Act.<sup>1</sup> Over four years ago, in a separate proceeding relating to the same transactions and the same alleged practices at issue here, the Commission confirmed that the Olympus Funds are not subject to the jurisdiction of the Commission. *See* O.R. App. 24, Order in Docket No. 08-07 at 10 (served June 15, 2009) ("Petitioners are private equity funds that are not subject to the Commission's jurisdiction, are not entities regulated by the Commission, and are not in a position to take action that places them in peril insofar as the Commission is concerned.").

Notwithstanding the Commission's clear conclusion that the Olympus Funds are not subject to the Commission's jurisdiction, MOL has continued to assert claims against the Olympus Respondents. In response to Presiding Judge Guthridge's denial of the

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<sup>1</sup> None of the Olympus Respondents is or was a shipper, NVOCC, ocean transportation intermediary, freight forwarder or any other entity regulated by the Commission.

Olympus Respondents' *Motion to Dismiss Improperly Filed Complaint for Lack of Subject Matter Jurisdiction and for Failure to State a Claim and for Other Appropriate Relief*, the Commission stated that **only actual participation** by the Olympus Respondents in the alleged violations of the Shipping Act could render the Olympus Respondents liable to MOL on proven allegations of the Amended Complaint, or to Respondent Global Link Logistics, Inc. ("Global Link") on its crossclaim. MOL App. 1063, 1065, *Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motions to Dismiss* (Aug. 1, 2011) ("FMC Order") at 34, 36. In fact, the Commission directed that this threshold jurisdictional issue be determined *as an initial matter. Id.*:

An initial issue to be determined by the ALJ is whether the evidence produced proves that Olympus Respondents and/or CJR Respondents participated in the Shipping Act violations alleged[;]

In order to prevent delay or undue inconvenience in this proceeding, the ALJ should direct the parties to focus discovery first on the issue of whether Olympus Respondents and CJR Respondents engaged in the requisite participation -- as individuals or entities rather than mere shareholders of Global Link -- in Shipping Act violations to warrant holding them separately liable for violating section 10(a)(1) and/or section 10(d)(1), or whether claims against one or both of these parties should be rejected[;]

An initial issue to be determined by the ALJ is whether the evidence produced proves that Olympus and/or CJR Respondents participated in the Shipping Act violations alleged. In order to prevent delay or undue inconvenience, the ALJ should direct the parties to focus their initial discovery on the issue of the nature of these Respondents' alleged participation in the alleged Shipping Act violations, so that the ALJ can make an initial determination whether their continuation in the proceeding is warranted.

The Commission described such a course of action as necessary to “prevent delay and undue inconvenience.” MOL App. 1065, *id.* at 36; *see also* MOL App. 1101, *id.* at 72.

The threshold question of the Olympus Respondents’ purported participation in the alleged Shipping Act violations has never been addressed, despite the Olympus Respondents’ best efforts. The Olympus Respondents offered to, and did, file a motion for summary judgment on the participation issue, and even offered supplemental discovery if MOL deemed it necessary, as the mechanism for complying with the Commission’s explicit mandate. At no time did MOL or any other party initiate additional discovery on the issue of the Olympus Respondents’ purported participation. Nor did any other party cite a need for additional discovery in response to the Olympus Respondents’ summary judgment motion. Nearly a year after the Olympus Respondents filed their summary judgment motion, the motion was denied without any ruling on the merits.

The Presiding Judge issued his Initial Decision on July 9, 2013. The Presiding Judge only addressed MOL’s “core issue” (the question of MOL’s knowledge of and acquiescence in Global Link’s split routing practice) and concluded that MOL knew of and encouraged the split routing practice (a conclusion that the Olympus Respondents do not dispute). The Presiding Judge dismissed the Amended Complaint without making any findings of fact or conclusions of law concerning the Olympus Respondents’ purported participation in the activities underlying the alleged Shipping Act violations.

This case has run its course. No one has established jurisdiction over the Olympus Respondents, and it is too late now to do so. Out of an abundance of caution, however, the Olympus Respondents file this Reply to MOL’s Exceptions, without prejudice to the

fact that jurisdiction has not been, and on the evidence entered in this proceeding cannot be, established over the Olympus Respondents.

## II. Reply to MOL's Exceptions

The Commission should adopt the Presiding Judge's Initial Decision.<sup>2</sup> Counsel for MOL acknowledged almost three years ago that the **core issue** in this proceeding has always been whether MOL had knowledge of the practice of split routing, *i.e.*, whether MOL itself knew of, encouraged or participated in the very practice that it now argues is a violation of the Shipping Act: "The core issue I think that is presented in the litigation is: to what extent did Mitsui have knowledge and participate in it [split routing]?" Sept. 16, 2010 Hearing Tr. at 32-34.

The Presiding Judge now has conclusively disposed of the question posed by MOL's counsel. The evidence unequivocally supports the Presiding Judge's ruling on this core issue. MOL officers and employees at multiple levels knew about the split routing practice. *See* Global Link Reply Brief (filed May 31, 2013) at 7, and evidence cited therein. This is the second time that a disinterested finder of fact has reached the same conclusion. In the partial final award issued in the arbitration proceeding between the current and former owners of Global Link, the arbitration panel found that MOL knew about and encouraged Global Link's split routing, on much of the same evidence

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<sup>2</sup> MOL's Exceptions concern the Presiding Judge's findings of fact and conclusions of law regarding the understanding of the practice of split routing, MOL's knowledge, and the benefits that inured to MOL as a result of Global Link's split routing. The Olympus Respondents reply to MOL's Exceptions by incorporating by reference the reply of Respondent Global Link, to the extent Global Link's reply is consistent with the Olympus Respondents' prior positions in this proceeding. Furthermore, the Olympus Respondents concur in the Presiding Judge's analysis and application of agency law to the issue of MOL's knowledge in this proceeding.

before the Presiding Judge in this proceeding. *See* MOL App. 10, Partial Final Award, Case No. 14 125 Y 01447 07, at 10:

As for the carriers' knowledge, there is clear evidence that a senior sales representative of Mitsui knew that Global Link was engaged in split-routing, and Mitsui did not object--indeed, Mitsui encouraged continuation of the practice--because Mitsui preferred not to be bothered with negotiating a multiplicity of door points.

At the eleventh hour, even MOL could not avoid acknowledging that its own officers (Paul McClintock, Vice President/General Manager and later Vice President of Sales and Support for the United States) and senior employees (Rebecca Yang, Regional Sales Manager) knew about Global Link's split routing. *See* MOL Reply Brief (filed May 1, 2013) at 40 ("McClintock and Yang were collaborating with Respondents"). The Presiding Judge's findings and conclusions are squarely based on overwhelming record evidence of MOL's knowledge of and acquiescence to Global Link's split routing.

MOL's case is built on an edifice of false statements, misstatements and irreconcilable theories. For example, MOL tries to deny that it benefited from its acquiescence to Global Link's split routing practice, even though MOL relies to testimony from Edward Feitzinger, an officer of Golden Gate Logistics (Global Link's current parent company), that "we [Global Link] had helped make Paul [McClintock] a success in MOL." MOL Reply Brief at 39. Only one logical conclusion can be drawn from this testimony -- McClintock was a success at MOL because of the benefits that MOL derived from McClintock's work, including his maintenance of the Global Link account. McClintock's success at MOL depended on advancing MOL's interests, not on acting adversely to those interests or operating solely for his own personal gain.

MOL also argues that “GLL knew the practice of split routing was illegal and thus knew it would not be approved by MOL.”<sup>3</sup> MOL’s Exceptions at 46. From this statement, the Commission is supposed to infer that MOL would not approve or engage in activities that were allegedly illegal (*i.e.*, violated or potentially violated the Shipping Act). Conveniently, MOL ignores the fact that it paid penalties to the Commission in May 2011 to settle allegations *against it* regarding numerous violations of the Shipping Act, including providing transportation that was not in accordance with the rates and charges set forth in MOL’s published tariffs. *See* GLL Supp. App. 577-79. MOL cannot have it both ways.

MOL further argues that the resolution of the knowledge issue should mirror that of the California district court in *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 2013 U.S. Dist. LEXIS 40466 (N.D. Cal. 2013) (“*Seamaster*”). MOL’s reliance on *Seamaster* is a last-ditch, misguided effort at a chance of recovery. *Seamaster* is factually distinct on a number of grounds, including, but not limited to, the differences in the practices at issue, the benefits inuring to MOL because of those practices, and the

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<sup>3</sup> A cursory reading of the Olympus Funds’ 2008 petition to the Commission in Docket No. 08-07 would have alerted even the casual observer to the substantial questions surrounding the alleged illegality of the split routing practice. *See Emergency Petition for Declaratory Order, Rulemaking or Other Appropriate Relief in Voluntary Disclosure Investigation* (FMC Docket No. 08-07; filed Nov. 13, 2008). The Olympus Respondents have never agreed nor conceded that split routing violates the Shipping Act and never received legal advice that split routing violates the Shipping Act. MOL’s statements to the contrary in its Reply Brief were false. The Olympus Respondents alerted the Presiding Judge to this fact in their *Motion to Strike False Statements in Complainant’s Reply Brief in Further Support of Its Claims Against Respondents* (filed May 24, 2013). Moreover, it has never been established that the practice violated the Shipping Act, and the authority that MOL relied on in this case, *Kawasaki Kaisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010) (a Carriage of Goods by Sea Act case), was decided years after Global Link ended the split routing practice.

determined (in *Seamaster*) and alleged (in this case) “adverse interests” of the knowledgeable and participating MOL employees.<sup>4</sup> Thus, *Seamaster* is not controlling and does not absolve MOL of its knowledge of Global Link’s activities.

Reliance on *Seamaster* also would unfairly prejudice the Respondents and deny them due process. From the beginning of this proceeding, MOL’s position had been that it did not know, and it could not have known, of Global Link’s split routing activities. MOL’s admission of the knowledge of its employees (and its argument that such knowledge should not be imputed to it) appeared at the eleventh hour in this proceeding in MOL’s Reply Brief. The Olympus Respondents had no opportunity to respond to MOL’s Reply Brief and therefore had no opportunity to address MOL’s admission of knowledge and arguments against imputation. *See Johnson v. Lyon*, No. 1:06-CV-1289DFHTAB, 2008 WL 5396606, at \*5 n.1 (S.D. Ind. Dec. 24, 2008) (stating that it would be unfair to consider a new legal theory raised in a reply brief because plaintiffs did not have the opportunity to respond to it), citing *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989), superseded on other grounds by statute (“When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B—a ground the movant might have presented but did not.”).

The Commission’s review of this case will confirm that the Presiding Judge’s findings and conclusions regarding MOL’s knowledge of and participation in the

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<sup>4</sup> MOL’s disavowal of the knowledge of its former officers and employees is an effort to save MOL from the consequences of its actions and is inconsistent with the Presiding Judge’s proper application of agency law to the evidence in this proceeding.



activities at issue are correct and well supported by the record, and that the law and evidence in this proceeding precludes MOL's recovery.

### **III. Reservation of Rights**


The Olympus Respondents reserve all rights with respect to MOL's wrongful filing and the prosecution of this proceeding against them. The Olympus Respondents also expressly reserve all rights to participate in any further proceedings to the extent necessary to protect their interests.

### **IV. Conclusion**

For the foregoing reasons, as well as all the reasons set forth by Respondent Global Link, the Presiding Judge's Initial Decision is correct and should not be disturbed.

Dated: August 22, 2013

Respectfully submitted,



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**CERTIFICATE OF SERVICE**


I hereby certify that on August 22, 2013, I served the foregoing document on the following individual(s) by electronic mail and regular mail:

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